

ORIGINAL

NEW APPLICATION



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BEFORE THE ARIZONA CORPORATION COMMISSION

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2010 SEP -9 P 1:32

Arizona Corporation Commission

DOCKETED

AZ CORP COMMISSION
DOCKET CONTROL

SEP -9 2010

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In the matter of:

Richard M. Schmerman, individually and
d/b/a Diversified Financial and/or Diversified
Financial Planners, and Amy Schmerman,
husband and wife;

Respondents.

DOCKET NO. S-20757A-10-0373

NOTICE OF OPPORTUNITY FOR HEARING
REGARDING PROPOSED ORDER TO
CEASE AND DESIST, ORDER OF
REVOCATION, ORDER OF DENIAL AND
ORDER FOR OTHER AFFIRMATIVE
ACTION

NOTICE: EACH RESPONDENT HAS 10 DAYS TO REQUEST A HEARING

EACH RESPONDENT HAS 30 DAYS TO FILE AN ANSWER

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") alleges that respondent Richard M. Schmerman, individually and d/b/a Diversified Financial and/or Diversified Financial Planners, has engaged in acts, practices, and transactions that constitute violations of A.R.S. § 44-1801, *et seq.*, the Arizona Securities Act ("Securities Act"), and A.R.S. § 44-3101, *et seq.*, the Investment Management Act ("IM Act").

I.

JURISDICTION

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution, the Securities Act, and the IM Act.

II.

RESPONDENT

2. For all times relevant, Richard M. Schmerman ("Schmerman") was an Arizona resident.

1 3. Diversified Financial and Diversified Financial Planners (collectively "DF") are
2 trade names registered with the Arizona Office of the Secretary of State ("SOS") and owned by
3 Schmerman.

4 4. Documents filed with the SOS state that Diversified Financial Planners' business
5 type is tax preparation and portfolio management services and Diversified Financial's business type
6 is financial advisory services.

7 5. For all times relevant, Schmerman was acting as an investment adviser
8 representative in Arizona.

9 6. For all times relevant, Schmerman operated from an office located in Maricopa
10 County, Arizona.

11 7. Schmerman was a registered securities salesman from on or about November 6,
12 1986, to March 13, 2008, and from May 15, 2008, to March 10, 2010, CRD# 1302988.

13 8. From on or about March 31, 1999, to March 12, 2008, Schmerman was registered in
14 Arizona as a securities salesman in association with Mutual Service Corporation ("MSC"). For the
15 relevant time frame, MSC, CRD# 4806, was a federally licensed Investment Adviser ("IA") and an
16 IA notice filer in Arizona.¹ MSC is also a registered securities dealer, federally and with the state of
17 Arizona.

18 9. From on or about May 15, 2008, to March 10, 2010, Schmerman was registered as a
19 securities salesman in Arizona in association with United Planners' Financial Services of America, a
20 limited partnership ("United Planners"). United Planners, CRD# 20804, is a federally licensed IA
21 and an IA notice filer in Arizona. United Planners is also a registered securities dealer, federally and
22 with the state of Arizona.

23 10. From on or about June 3, 2008, to March 10, 2010, Schmerman was licensed in
24 Arizona as an investment adviser representative ("IAR") in association with United Planners.

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¹ On December 23, 2009, MSC's federal IA license was terminated.

1 20. Client 1 was not aware that a Charles Schwab Institutional Brokerage account was
2 not established in her name or that her monies were not placed with Charles Schwab as
3 represented.

4 21. Schmerman maintained a business savings account in the name of Diversified
5 Financial at Wells Fargo Bank ("DF Bank Account").

6 22. Schmerman was the sole authorized signatory on the DF Bank Account and
7 accessed and controlled the account and the funds contained therein.

8 23. On or about May 4, 2005, Schmerman deposited the entire \$175,000 into the DF
9 Bank Account.

10 24. Client 1 was not aware that her money was deposited into a DF Bank Account
11 owned and controlled by Schmerman.

12 25. In May 2005 and various later months, Schmerman made money transfers from the
13 DF Bank Account to a personal bank account of Schmerman.

14 26. Client 1 did not authorize in writing the transfer of her monies to the DF Bank
15 Account or to Schmerman's personal account and Client 1 is not a relative of Schmerman.

16 27. Client 1's monies in the DF Bank Account were withdrawn as cash or commingled
17 by Schmerman.

18 28. On or around August 2006, Schmerman provided an account statement in the name
19 of Client 1, which contained the following:

20 a) Richard M. Schmerman, CFP, ChFC, Licensed Investment Advisor; and

21 b) A column heading that read, "Institutional Money Market Account."

22 29. Schmerman was not a licensed investment adviser on or around August 2006.

23 30. On or around June 3, 2008, Schmerman became affiliated with United Planners as a
24 licensed IAR.

25 31. On or about June 2008, a Charles Schwab Institutional Brokerage Account
26 ("Schwab Account") was opened in the name of Client 1's daughter, who is also an Arizona

1 resident ("Client 2"). Diversified Financial was listed as the IA on the Schwab Account
2 application.

3 32. In addition, the Schwab Account application also stated that:

4 a) Client 2 authorized Schwab to execute security trades in the account at the
5 direction of the IA; and

6 b) Client 2 authorized Schwab to pay IA and related IA fees from the account
7 in the amount of IA's instructions.

8 33. Both above Schwab Account provisions were initialed by Client 2 and the
9 application was signed by Client 2.

10 34. The Schwab Account application also authorized Schmerman to access Client 2's
11 account and execute discretionary security trades.

12 35. In or around August 2008, Client 1 gifted the remaining value of her account,
13 approximately \$117,204, to Client 2.

14 36. Schmerman was contacted to help effectuate the gifting transaction.

15 37. On or about August 14, 2008, Schmerman acknowledged the gifting transaction and
16 stated in writing that Client 1 had gifted the amount from Client 1's Schwab Institutional
17 Brokerage Account to Client 2's Schwab Account.

18 38. Schmerman represented that the \$117,204 was deposited into Client 2's Schwab
19 Account in which Schmerman had discretionary trading authority.

20 39. However, Schmerman never funded Client 2's Schwab Account as represented
21 because no monies were ever placed in the account.

22 40. Client 2 was unaware that the funds were never transferred to Client 2's Schwab
23 Account as Client 2 had requested.

24 41. On or about November 18, 2009, Client 2 requested that \$30,000 of her monies be
25 transferred to a specific account before December 1, 2009.

1 42. On November 18, 2009, Schmerman responded in writing that he "will take care of
2 it."

3 43. The entire \$30,000 was not transferred on or before December 1, 2009, to Client 2's
4 specified account as requested.

5 44. On or about December 1, 2009, Schmerman transferred \$15,000 to Client 2.

6 45. On or about December 21, 2009, Schmerman transferred \$10,000 to Client 2.

7 46. On or about December 23, 2009, Client 2 corresponded with Schmerman and stated
8 that since the \$30,000 amount still had not been fully received, Client 2 was requesting a final
9 statement, that her account be closed, and that the full remainder of her funds be transferred to her
10 personal account by January 13, 2010.

11 47. On or about December 23, 2009, Client 2's remaining account balance was
12 approximately \$52,500.

13 48. On January 15, 2010, Client 2 contacted Schmerman to alert him that no transfers of
14 monies had been received by Client 2 yet.

15 49. On January 25, 2010, Schmerman transferred \$35,000 to Client 2.

16 50. On February 1, 2010, Client 2 contacted Schmerman to alert him that a final transfer
17 and a final account statement still had not been received.

18 51. On or around February 26, 2010, Client 2 contacted United Planners regarding her
19 ongoing difficulties with Schmerman. Shortly thereafter, United Planners conducted an internal
20 inquiry after it was made aware of Schmerman's failure to release Client 2's funds as requested.

21 52. On March 5, 2010, United Planners submitted a final payment to Client 2 for the
22 remaining outstanding balance.

23 53. On March 10, 2010, United Planners discharged Schmerman for violating company
24 policy. United Planners stated that pursuant to its own investigation, it determined that Schmerman
25 had commingled client assets with his own checking account.
26

56. On May 6, 2010, Schmerman, for and on behalf of DFP LLC, filed an application
ensure as an IA.

58. Schmerman would be the sole IAR for DFP LLC.

REMEDIES PURSUANT TO A.R.S. § 44-1962

59. Respondent's conduct is grounds to revoke Respondent's registration with the Commission as a securities salesman pursuant to A.R.S. § 44-1962. Specifically, Respondent has:

(i) Unreasonable delay in the delivery of funds to a client that the salesman is in a position to control or direct the delivery of the funds within the meaning of R14-4-130(A)(1); and

b) Engaged in dishonest or unethical practices in business or financial matters during the period of A.R.S. § 44-1962(A)(12), which includes but is not limited to, in or around May 2008 and various other months, Schmerman made unauthorized money transfers from the DF Bank personal bank account of Schmerman.

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1 a) Engaged in dishonest or unethical practices in the securities industry, within the
2 meaning of A.R.S. § 44-1962(A)(10), which includes but is not limited to:

3 (i) Unreasonable delay in the delivery of funds to a client that the salesman is in a
4 position to control or direct the delivery of the funds, within the meaning of
5 R14-4-130(A)(1); and

6 (ii) Making unauthorized use of funds of a customer or converting customer funds
7 for personal benefit, within the meaning of R14-4-130(A)(16).

8 V.

9 REMEDIES PURSUANT TO A.R.S. § 44-3201

10 (Denial, Revocation, or Suspension of Investment Adviser or Investment Adviser Representative
11 License; Restitution, Penalties, or other Affirmative Action)

12 61. Respondent's conduct is grounds to revoke Respondent's license with the Commission
13 as an investment adviser representative pursuant to A.R.S. §§ 44-3201 and 44-3202(D). Specifically,
14 revocation of Respondent's license would be in the public interest, and Respondent violated Chapter
15 13 and a rule or order of the commission adopted or issued under Chapter 13 within the meaning of
16 A.R.S. § 44-3201(A)(3). Specifically, Respondent violated A.R.S. § 44-3241 when he represented
17 that Client 2's funds were actually deposited into Client 2's Schwab Account in which he had
18 discretionary trading authority; however, Respondent never funded Client 2's Schwab Account as
19 represented because no monies were ever placed in the account.

20 62. Respondent's conduct is grounds to deny Respondent's license application with the
21 Commission as an investment adviser representative pursuant to A.R.S. § 44-3201. Specifically,
22 denial of Respondent's license application would be in the public interest, and Respondent:

23 a) Engaged in dishonest or unethical practices in the securities industry within
24 the meaning of A.R.S. § 44-3201(A)(13). Specifically:
25
26

1 (i) Respondent violated R14-6-203(6) when he borrowed money from a client or
2 client's account that was not authorized in writing and the client was not a
3 relative of Respondent; and

4 (ii) On or around August 2006, Schmerman provided an account statement that
5 misrepresented his qualifications, in violation of R14-6-203(8), because it
6 stated, "Richard M. Schmerman, CFP, ChFC, Licensed Investment
7 Advisor"; however, Schmerman was not a licensed investment adviser on or
8 around August 2006.

9 63. Respondent's conduct is grounds to assess restitution, penalties, and/or take appropriate
10 affirmative action pursuant to A.R.S. § 44-3201. Specifically, Respondent has:

11 a) Engaged in dishonest or unethical practices in the securities industry within the
12 meaning of A.R.S. § 44-3201(A)(13). Specifically:

13 (i) Respondent violated R14-6-203(6) when he borrowed money from a client or
14 client's account that was not authorized in writing and the client was not a
15 relative of Respondent; and

16 (ii) On or around August 2006, Schmerman provided an account statement that
17 misrepresented his qualifications, in violation of R14-6-203(8), because it
18 stated, "Richard M. Schmerman, CFP, ChFC, Licensed Investment
19 Advisor"; however, Schmerman was not a licensed IA on or around August
20 2006.

21 **VI.**

22 **VIOLATION OF A.R.S. § 44-3241**

23 **(Fraud in the Provision of Investment Advisory Services)**

24 64. Respondent engaged in a transaction or transactions within or from Arizona involving
25 the provision of investment advisory services in which Respondent, directly or indirectly: (i) employed
26 a device, scheme, or artifice to defraud; (ii) made untrue statements of material fact or omitted to state

1 material facts that were necessary in order to make the statements made not misleading in light of the
2 circumstances under which they were made; (iii) misrepresented professional qualifications with the
3 intent that the client rely on the misrepresentation; or (iv) engaged in transactions, practices, or courses
4 of business that operated or would operate as a fraud or deceit. Respondent's conduct includes, but is
5 not limited to, the following:

6 a) Represented orally to Client 1 and/or Client 1's daughter that a Charles
7 Schwab Institutional Brokerage Account was established for Client 1 in which her monies were
8 placed; however, no Charles Schwab Institutional Brokerage Account in the name of Client 1 was
9 ever opened, established, or funded by Schmerman; and

10 b) Represented that Client 2's funds were actually deposited into Client 2's
11 Schwab Account in which Schmerman had discretionary trading authority; however, Schmerman
12 never funded Client 2's Schwab Account as represented because no monies were ever placed in the
13 account.

14 65. This conduct violates A.R.S. § 44-3241.

15 VII.

16 REQUESTED RELIEF

17 The Division requests that the Commission grant the following relief:

18 1. Order Respondent to permanently cease and desist from violating the Securities Act
19 and IM Act, pursuant to A.R.S. §§ 44-2032, 44-3292, 44-1962, and 44-3201;

20 2. Order Respondent to pay the state of Arizona administrative penalties of up to five
21 thousand dollars (\$5,000) for each violation of the Securities Act, pursuant to A.R.S. § 44-2036;

22 3. Order Respondent to pay the state of Arizona administrative penalties of up to one
23 thousand dollars (\$1,000) for each violation of the IM Act, pursuant to A.R.S. § 44-3296;

24 4. Order Respondent to pay the state of Arizona administrative penalties, pursuant to
25 A.R.S. § 44-1962 and 44-3201;

5. Order the revocation of Respondent's registration as a securities salesman pursuant to A.R.S. § 44-1962;

6. Order the revocation of Respondent's license as an investment adviser representative pursuant to A.R.S. § 44-3201;

7. Order the denial of Respondent's license application as an investment adviser representative pursuant to A.R.S. § 44-3201;

8. Order that the marital community of Respondent and Respondent Spouse be subject to any order of administrative penalties or other appropriate affirmative action pursuant to A.R.S. § 25-215; and

9. Order any other relief that the Commission deems appropriate.

VIII.

HEARING OPPORTUNITY

Each respondent, including Respondent Spouse, may request a hearing pursuant to A.R.S. § 44-1972, 44-3212, and A.A.C. R14-4-306. **If Respondent or Respondent Spouse requests a hearing, the requesting respondent must also answer this Notice.** A request for hearing must be in writing and received by the Commission within 10 business days after service of this Notice of Opportunity for Hearing. The requesting respondent must deliver or mail the request to Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona 85007. Filing instructions may be obtained from Docket Control by calling (602) 542-3477 or on the Commission's Internet web site at <http://www.azcc.gov/divisions/hearings/docket.asp>.

If a request for a hearing is timely made, the Commission shall schedule the hearing to begin 20 to 60 days from the receipt of the request unless otherwise provided by law, stipulated by the parties, or ordered by the Commission. If a request for a hearing is not timely made the Commission may, without a hearing, enter an order granting the relief requested by the Division in this Notice of Opportunity for Hearing.

1 Persons with a disability may request a reasonable accommodation such as a sign language
2 interpreter, as well as request this document in an alternative format, by contacting Shaylin A.
3 Bernal, ADA Coordinator, voice phone number 602-542-3931, e-mail sabernal@azcc.gov.
4 Requests should be made as early as possible to allow time to arrange the accommodation.

5 **IX.**

6 **ANSWER REQUIREMENT**

7 Pursuant to A.A.C. R14-4-305, if Respondent or Respondent Spouse requests a hearing, the
8 requesting respondent must deliver or mail an Answer to this Notice of Opportunity for Hearing to
9 Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona 85007,
10 within 30 calendar days after the date of service of this Notice. Filing instructions may be obtained
11 from Docket Control by calling (602) 542-3477 or on the Commission's Internet web site at
12 <http://www.azcc.gov/divisions/hearings/docket.asp>.

13 Additionally, the answering respondent must serve the Answer upon the Division. Pursuant
14 to A.A.C. R14-4-303, service upon the Division may be made by mailing or by hand-delivering a
15 copy of the Answer to the Division at 1300 West Washington, 3rd Floor, Phoenix, Arizona, 85007,
16 addressed to Phong (Paul) Huynh.

17 The Answer shall contain an admission or denial of each allegation in this Notice and the
18 original signature of the answering respondent or respondent's attorney. A statement of a lack of
19 sufficient knowledge or information shall be considered a denial of an allegation. An allegation not
20 denied shall be considered admitted.

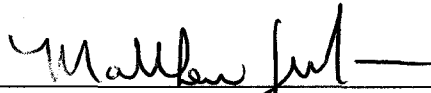
21 When the answering respondent intends in good faith to deny only a part or a qualification
22 of an allegation, the respondent shall specify that part or qualification of the allegation and shall
23 admit the remainder. Respondent waives any affirmative defense not raised in the Answer.

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1 The officer presiding over the hearing may grant relief from the requirement to file an
2 Answer for good cause shown.

3 Dated this 9 day of September, 2010.

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6 Matthew J. Neubert
7 Director of Securities
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